

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

New York State Electric & Gas Corporation

Project No. 2738-053

ORDER ON REHEARING

(Issued May 7, 2003)

1. This order denies the New York State Electric & Gas Corporation's (NYSEG) request for rehearing of an order in which the Commission permitted NYSEG to amend its license for the 38.74-megawatt Saranac Project No. 2738 by deleting 101 acres not needed for project purposes, but required NYSEG to develop plans to protect remaining project land from potential effects which activities conducted on the non-project land may have on the project.

Background

2. On September 27, 2000, NYSEG applied to remove from the Saranac Project's boundaries a 101-acre parcel of land that is part of the project's 365-acre Kents Falls Development, located in the Town of Schuyler Falls, Clinton County, New York. NYSEG stated that it would then transfer the 101 acres to Clinton County and/or New England Waste Services of New York, Inc. (jointly, County), which would use the land to expand the County's 100-acre solid waste landfill, located adjacent to the Kents Falls development on the south side of the Saranac River.¹

3. In an order issued January 30, 2003,² the Commission determined that, because the project's approved Exhibit R does not include the parcel as land to be used for recreation, and the parcel has not been shown to be needed for any other specified project purpose, it need not be kept within the project boundary. However, the Commission also recognized

¹Following the transfer, a 500-foot wide buffer between the land to be sold and the project reservoir would remain within the project.

²102 FERC ¶ 61,086 (Commissioner Massey dissenting).

that the use of the non-project parcel for expanded landfill operations could have some effects upon remaining project lands and the project reservoir. Accordingly, it required NYSEG to submit, for Commission review and approval, an erosion, sedimentation, and wind-borne debris control plan, a plan to detect migration of landfill leachate into project lands, and an updated recreation plan,³ all to take into account needed protections against possible effects of the landfill, if expanded.

4. On rehearing, NYSEG argues that its compliance with the Commission's order would require NYSEG to exert control over non-project lands and facilities in order to mitigate for effects originating on non-project lands. It maintains that the Commission lacks authority to require a licensee to mitigate for impacts caused by a third party's activities on lands outside the project boundary, and therefore that conditioning approval of the license amendment upon NYSEG's submission of plans to mitigate for such third party impacts is unlawful. It suggests that the Commission should defer to the state permitting process concerning such mitigation.⁴

Discussion

³NYSEG states that it already submitted, in November 2002, a proposed amendment to its existing recreation plan that would expand recreational opportunities at the project. However, that plan, whose consideration is now pending, was submitted prematurely, apparently in anticipation of the Commission's January 30, 2003 order, and it does not include measures to protect the project's recreation from potential landfill effects. NYSEG may meet this requirement of the Commission's order by supplementing the November 2002 submission.

⁴On March 17, 2003, New England Waste Services of N.Y., Inc. (New England Waste) filed a motion for leave to respond and an answer to NYSEG's rehearing request. New England Waste states that it neither supports nor opposes NYSEG's request but simply is offering information concerning New York state's regulation of solid waste landfills that may be helpful to the Commission in clarifying the issues raised by NYSEG on rehearing. Pursuant to Rule 213 of the Commission's regulations, 18 C.F.R. § 385.211 (2002), answers to requests for rehearing are not permitted. While New England Waste argues that Rule 213 may be waived where a responsive pleading will assist the Commission in its decisional process, the information proffered, relating to the state permitting process, is not pertinent to the resolution of the issues on rehearing. See discussion, infra.

5. As NYSEG notes in its rehearing request, the Commission's regulatory authority does not extend to non-project land; that is, the Commission has authority to regulate only those lands and facilities that it has licensed. As NYSEG also notes, once the parcel is removed from the project boundary,⁵ the activities giving rise to environmental concerns will all occur outside the project boundary on the landfill operator's land, NYSEG will have no control over that land or those activities, and the Commission will have no authority to enforce any plans setting out protective or mitigative measures which must be performed there.

6. However, NYSEG's argument presumes that the only protective or mitigative actions that can be taken must occur on the non-project land at the landfill, and that the Commission's order therefore necessarily contemplates the licensee's development of plans for mitigation outside the project boundary. That is not the case. While we have not set out specific measures that NYSEG must include in its plans, there are many measures that can be adopted and performed within the project boundary that will protect the project's land and reservoir from debris and leachate contamination, as well as measures that will mitigate for such contamination if it should occur.⁶ The Commission's order contemplates development only of the kinds of measures that can be performed within the project boundary.

⁵The removal from the project boundary is not effective until the required plans have been approved by the Commission. See ordering paragraph (A), 102 FERC at p. 61,235.

⁶For example, the licensee may develop a plan to monitor project lands for erosion, sedimentation, and debris carried by the wind from the landfill into the project's boundaries, along with measures to check such erosion and sedimentation, and for collection, removal, and disposal of debris from project land along the shoreline and from the project reservoir if and when it should occur. Measures to protect the project's recreation against landfill effects could include the building of high fences and/or the planting of dense vegetation to separate the project from the landfill, and institution of a litter clean-up program. The detection of landfill leachate migration in the ground water before it enters the project's reservoir could be achieved through a plan that includes well siting and water sampling within the project boundary, along with a contingency plan providing for the development of interceptor wells if and when such contamination is discovered. (Interceptor wells routinely are used to pump contaminated groundwater to the surface, where it can be treated and appropriately disposed of.)

The Commission orders:

(A) The request for rehearing filed by New York State Electric & Gas Corporation is denied.

(B) The motion of New England Waste Services of N.Y., Inc., for leave to respond and file an answer to NYSEG's rehearing request is denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.